No. 82-1421

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

MILLIKEN & COMPANY,
Petitioner,

v.

BURLINGTON INDUSTRIES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Of Counsel:
HOWARD L. BURNS
BURNS, MCDONALD, BRADFORD, ERWIN & PATRICK
Greenwood, South Carolina

GRIFFIN B. BELL
(Counsel of Record)
KING & SPALDING
2500 Trust Company Tower
Atlanta, Georgia 30303
404/572-4600
Attorneys for Petitioner Milliken & Company

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. In an antitrust case where patent royalties have been found to be fixed by a conspiracy, did the district court have the authority under § 4 of the Clayton Act to exclude from the treble damage judgment all sums attributable to one conspirator who is not a defendant in this case and who earlier settled with the plaintiff?

2. Should the defendants have an opportunity to prove that the cause of two-thirds of the treble damages claimed by the plaintiff was not the defendants' conspiracy, but instead was the plaintiff's own conduct?

3. Was the Fourth Circuit in error to hold that the plaintiff established a "prima facie" case on damages under § 4 of the Clayton Act solely by proving the amount of royalties actually paid, without also showing the amount of royalties that would have been paid absent the conspiracy?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Petitioner Milliken & Company ("Milliken") submits this brief in reply to the brief in opposition of Respondent Burlington Industries, Inc. ("Burlington").[1] The list required by Rule 28.1 of the Rules of this Court is contained in Milliken's petition for certiorari.

I. This Court's Opinion in *Texas Industries* Invites Examination of the Judge-Made Doctrine of Joint and Several Liability in Antitrust Cases

Burlington's argument that this Court should not examine the judicially-created doctrine of joint and several liability as applied in antitrust cases rests on the mis-

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[1] Because Burlington in its brief devotes inordinate attention to the liability issues in this case, it is worth noting that the questions raised by Milliken in its petition go to the damage issues here and not to liability.

taken premise that this doctrine can be modified *only* where contribution is permitted. Since contribution is not permitted in antitrust cases, *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981), Burlington claims that joint and several liability cannot be modified here.

The flaw in Burlington's argument is that, as the Fourth Circuit recognized, "the narrow holding of *Texas Industries* does not expressly foreclose a defense of claim reduction." App. 25. Indeed, as Milliken argued in its petition for certiorari, this Court in *Texas Industries* gave a rationale for joint and several liability that is at least in tension with the broad scope of that doctrine in its traditional form. *Texas Industries*, 451 U.S. at 646; Milliken Pet. at 12. This invites examination of joint and several liability, especially since this Court has never squarely decided the proper scope of that doctrine in an antitrust case.

As the district court below held, App. 72, and as the Fourth Circuit implicitly conceded in its reference to *Texas Industries*, App. 25, there is no direct link between the scope given joint and several liability by the courts on the one hand, and the existence of a right of action for contribution on the other. Burlington cites neither authority nor reason for its assertion that contribution must be adopted before any limitation may be placed on joint and several liability. *See* Brief in Opp. at 26-27.

Burlington argues that any modification of joint and several liability should be enacted by Congress. Brief in Opp. at 28. This argument overlooks the fact that joint and several liability—unlike contribution—is a wholly judicial doctrine. There is no express mandate in § 4 of the Clayton Act, or in its legislative history, for the courts to adopt joint and several liability. As this Court recognized in *Texas Industries*, the adoption of joint and several liability was an exercise of judicial authority. *Texas Industries*, 451 U.S. at 464. Given that the courts

were authorized to adopt joint and several liability in the first instance, then surely the courts must also be authorized to modify it.

Burlington's final argument is that it would be unfair to Burlington to deny its putative right to take ninety-five percent (95%) of its Leesona-related treble damages from Milliken and the other defendants here. There is no dispute that Burlington is entitled to recover here *all* its treble damages attributable to these defendants; the question is whether Burlington shall also be permitted to charge Milliken (Burlington's competitor) with treble damages attributable to Leesona (Burlington's supplier). This question should be resolved against Burlington.

II. Burlington's Argument that Causation is Matter Exclusively for the Liability Phase of a Bifurcated Trial is Contrary to the Rules Governing "Fact of Injury" Under § 4 of the Clayton Act

Burlington's argument on the causation issue is simple but wrong. According to Burlington, Milliken cannot now present evidence on the causation of Burlington's claimed Leesona-related treble damages because this issue was decided in the liability phase of this bifurcated case. Brief in Opp. at 20. This is wrong both because this issue was *not* decided in the liability phase and, more importantly, because Burlington and the Fourth Circuit have a serious misconception of the "fact of injury" showing a plaintiff must make in an antitrust case.

In the liability phase, the district court below made detailed findings that Burlington's payment of royalties to Milliken Research Corporation constituted "injury" within the meaning of § 4 of the Clayton Act. 444 F. Supp. 648, 687 (D.S.C. 1977). *Leesona is not mentioned anywhere in these "injury" findings.* Nowhere in its one hundred and thirty page liability opinion did the district court find or suggest that Burlington's payment of royalties to Leesona constituted injury under § 4.

Burlington points to an adopted finding of fact that it claims shows that "the district court . . . found that fact of damage was established by reason of Respondents' royalty payments to Leesona." Brief in Opp. at 9. Burlington quotes only a phrase from this adopted finding, and for good reason: the adopted finding says *nothing* about injury, impact, fact of damage or § 4. The district court adopted this finding in support of its holding on the existence of a horizontal conspiracy. *See* 444 F. Supp. 648, 682 (D.S.C. 1977). The district court included no reference to this adopted finding in its discussion of "injury" under § 4. Finally, the opening paragraph of this adopted finding, which refers to "effects on United States trade and commerce," makes plain that the district court adopted it to satisfy the jurisdictional "trade or commerce" requirement in § 1 of the Sherman Act.

Burlington's position, therefore, is untenable. There was no finding in the liability phase that Burlington was "injured" within the meaning of § 4 by paying royalties to Leesona. This does not mean, however, that Burlington is precluded from offering proof of its Leesona-related damages in the damages phase. In any bifurcated antitrust trial, the plaintiff to establish liability must prove only *some* injury; he need not prove *all* his injury.[2] By the same token, in the damages phase a defendant is free to challenge on causation grounds any item of injury that (like the Leesona-related damages here) was not proven to be injury in the liability phase. *See J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 101 S.Ct. 1923, 1927, 1931 (1981).

Burlington's argument is that causation is a matter exclusively for the liability phase. If correct, this would require the plaintiff in any bifurcated trial to prove all—

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[2] As the Fourth Circuit stated in its discussion of the Fedelon damages, "[t]he liability phase of the trial did not require plaintiffs to *separate out their various items of damage*." App. 20 (emphasis added).

not just some—of his injury in the liability phase. Unfortunately, the Fourth Circuit adopted Burlington's view that damage causation "goes to the issue of liability," App. 13, instead of recognizing that causation is a factor in both phases of an antitrust trial.

The importance of this issue for antitrust cases generally is shown by the frequency with which confusion arises in bifurcated cases over the question of what evidence on damage is appropriate in which phase. *E.g.*, *In re Plywood Antitrust Litigation*, 655 F.2d 627, 635-36 (5th Cir. 1981), *cert. granted sub nom. Weyerhaeuser Co.* v. *Lyman Lamb Co.*, 102 S.Ct. 2232 (May 17, 1982) (Nos. 81-1618 and 81-1619). Certiorari should be granted and this case decided by this Court in order to dispel this confusion.

III. The Fourth Circuit's *Prima Facie* Case Rule Undercuts the Requirement that a Treble Damage Award in a Price-Fixing Case Rest on Proof of an Overcharge

Burlington presents the Fourth Circuit's *prima facie* case rule as nothing more than a piece of judicial housekeeping. The rule, so Burlington claims, merely rearranges the "order of proof" in the court's discretion. Brief in Opp. at 14. Nothing in the Fourth Circuit's opinion supports Burlington's interpretation.

The critical point (which Burlington wholly ignores) is that, under the Fourth Circuit's rule, Burlington could prove the total amount of royalties it paid, rest its case and then be awarded treble damages, without *any* proof of an overcharge. This is flatly contrary to the established rule that in a price-fixing case some evidence of the amount of the overcharge must be adduced. Even the Fourth Circuit conceded that the total royalties paid bore no relationship to the amount of the overcharge. App. 10.

Far from being fact-bound, as Burlington claims, Brief in Opp. at 12, this is "an issue of broad reach—the appropriate measure of damages in cases where only one

element of the total price is fixed, whether it be freight, credit terms, packaging charges, *royalties* or the like." Petition for Certiorari of Weyerhaeuser Co. and Willamette Industries, Inc. at 18, *In re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981), *cert. granted sub nom. Weyerhaeuser Co.* v. *Lyman Lamb Co.*, 102 S.Ct. 2232 (May 17, 1982) (Nos. 81-1618 and 81-1619) (emphasis added).

Surprisingly, Burlington relies on *Westinghouse Electric and Manufacturing Co.* v. *Wagner Electric and Manufacturing Co.*, 225 U.S. 604, 621 (1912), where this Court held that the burden of proving the portion of defendant's total profits that was gained by patent infringement could rest on the defendant where the plaintiff, after exhausting "all available means of apportionment" has proven that "it was impossible to make a separation of the profits." *Westinghouse* would be dispositive here *if* Burlington had shown that proving the overcharge was impossible. But Burlington has never shown or even claimed that such proof is impossible. Consequently, the plain implication of *Westinghouse* is that the burden of proof on the overcharge should remain where it belongs— on Burlington.

IV. Conclusion

Milliken urges the Court to grant its petition for certiorari.

Respectfully submitted,

Of Counsel:
HOWARD L. BURNS
BURNS, MCDONALD, BRADFORD, ERWIN & PATRICK
Greenwood, South Carolina

GRIFFIN B. BELL
(Counsel of Record)
KING & SPALDING
2500 Trust Company Tower
Atlanta, Georgia 30303
404/572-4600
Attorneys for Petitioner Milliken & Company